

STORAGE NAME: h3585.go

DATE: March 6, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3585

RELATING TO: Public Hospital Lease

SPONSOR(S): Representative Peaden and others

COMPANION BILL(S): SB 1044(i) and SB 748(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) GOVERNMENTAL OPERATIONS
 - (2)
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

This bill provides that a private corporation that leases a public hospital or other public health care facility is not "acting on behalf" of the entity that owns the public hospital or other public health care facility, for purposes of s. 119.011(2) [defines "agency"] and s. 24(a), Art. I, Fla. Const., unless

- (1) The governing board of the entity that owns the public hospital or other public health care facility was the incorporator of the private corporation; **and**
- (2) A majority of the members of the governing board of the private corporation are also members of the governing board of the entity that owns the public hospital or other public health care facility.

This means that such a private corporation would not be subject to the public records law or the public meetings law.

This bill does not appear to have a direct fiscal impact on state or local governments.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Public Records Law

Article I, s. 24, Florida Constitution, expresses Florida's public policy regarding access to government records:

(a) Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

Article I, s. 24, Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24.

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07, F.S., provides:

Every person who has custody of a **public record** shall permit the record to be inspected and examined by any person desiring to do so, at a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

"Public records" are defined in s. 119.011(1), F.S., to mean

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any **agency**.

"Agency" is defined in s. 119.011(2), F.S., to mean

any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or **private agency**, person, partnership, corporation, or business entity **acting on behalf of any public agency**.

A complex question arises when determining whether a private corporation or entity, not otherwise connected with government, is "acting on behalf of" a public agency and thus subject to Chapter 119, F.S., (the Public Records Law). The Florida Supreme Court has stated that this broad definition of "agency" ensures that a public agency cannot avoid disclosure under the Public Records Law by contractually delegating to a private entity that which would otherwise be an agency responsibility. *News and Sun-Sentinel*

Company v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992).

Recognizing that “the statute provides no clear criteria for determining when a private entity is, ‘acting on behalf of’ a public agency,” the Supreme Court adopted a “totality of factors” approach to use as a guide for evaluating whether a private entity is subject to Chapter 119, F.S.

The factors listed by the Supreme Court include the following:

- 1) the level of public funding;
 - 2) commingling of funds;
 - 3) whether the activity was conducted on publicly-owned property;
 - 4) whether services contracted for are in integral part of the public agency’s chosen decision-making process;
 - 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
 - 6) the extent of the public agency’s involvement with, regulation of, or control over the private entity;
 - 7) whether the private entity was created by the public agency;
 - 8) whether the public agency has a substantial financial interest in the private entity;
 - 9) for whose benefit the private entity is functioning.
- Government in the Sunshine Manual, 1998 ed., Vol. 20, at 75.

In *News-Journal Corporation v. Memorial Hospital-West Volusia*, 695 So.2d 418 (Fla. 5th DCA 1997), the Fifth District Court of Appeal, reversing the lower court opinion, determined that Memorial Hospital-West Volusia, Inc., a private not-for-profit corporation (“Private Corporation”), was “acting on behalf of” a governmental entity, when it entered into a Lease and Transfer Agreement with the West Volusia Hospital Authority to operate the West Volusia Memorial Hospital. Because the court so held, the Private Corporation was therefore subject to the public records and public meetings laws. (The case is currently on appeal to the Florida Supreme Court.)

The court in *Memorial Hospital* utilized the *Schwab* totality of factors approach to reach its conclusion. In reaching its conclusion as to whether some of the factors were present, the court appeared to strain in order to reach its preferred conclusion. It is, however, beyond the scope of this analysis to debate the court’s opinion, that is left to the affected parties on appeal. Nonetheless, HB 3585 is in response to the Fifth District’s opinion in *Memorial Hospital*.

Public Meetings Law

Article I, s. 24(b), Florida Constitution, provides that

[a]ll meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public

Article I, s. 24(c), Florida Constitution, states that public meetings exemptions may be provided for by general law, if such law states with specificity the public necessity justifying the exemption and is no broader than necessary to accomplish the stated purpose of the law.

Public policy regarding public meetings is also addressed in the Florida Statutes. Section 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority or any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Section 286.011, F.S., is often referred to as the "Sunshine Law". The Sunshine Law has been held to apply to private entities created by law or by public agencies, and also to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties. Although much of the recent litigation regarding the application of the open government laws to private organizations has been in the area of public records, courts have, however, looked to the Public Records Law in determining the applicability of the Sunshine Law. *Cape Coral Medical Center, Inc. v. News-Press Publishing Co.*, 390 So.2d 1216, 1218 n. 5 (Fla. 2d DCA 1980)(inasmuch as the policies behind Ch. 119, F.S., and s. 286.011, F.S., are similar, they should be read together).

Accordingly, as the courts have emphasized in analyzing the application of Chapter 119, F.S., to agencies under contract with governmental agencies, the mere receipt of public funds by private corporations, is not, standing alone, sufficient to bring the organization within the ambit of the open government requirements. Thus, a private corporation which performs services for a public agency and receives compensation for such services pursuant to a contract or otherwise, is not by virtue of this relationship alone necessarily subject to the Sunshine Law unless the public agency's governmental or legislative functions have been delegated to it. Government In The Sunshine Manual, at 24.

B. EFFECT OF PROPOSED CHANGES:

This bill provides that a private corporation that leases a public hospital or other public health care facility is not "acting on behalf" of the entity that owns the public hospital or other public health care facility, for purposes of s. 119.011(2) [defines "agency"] and s. 24(a), Art. I, Fla. Const., unless

- (1) The governing board of the entity that owns the public hospital or other public health care facility was the incorporator of the private corporation; **and**
- (2) A majority of the members of the governing board of the private corporation are also members of the governing board of the entity that owns the public hospital or other public health care facility.

This means that such a private corporation would not be subject to the public records law or the public meetings law.¹

This bill does not create an exemption to the public records or public meetings law, thereby a public necessity statement is not needed. Article I, s. 24, of the State Constitution requires a public necessity statement when the Legislature creates an exemption. What this bill does is establish in law the nonapplicability of the public records and meetings laws to particular private corporations leasing public hospital or health care facilities. Currently, as discussed above, these private entities are considered subject to the public records and meetings laws. However, debate has arisen as to how far the public records and meetings law should extend to the private sector. Public entities often have to perform their duties and responsibilities when in competition with the private sector, whose records and meetings are not subject to public scrutiny. Public entities are often criticized for their performance and have in some cases turned to the private sector to more effectively and efficiently perform certain tasks -- taking advantage of the private sector's ability to compete and perform without certain governmental restraints, e.g., public records and public meetings laws. However, to the extent private entities are subjected to these governmental restraints, they too may become less effective and efficient. These concerns must be weighed nevertheless against the possibility that private entities will be used to circumvent the "Sunshine".

Another issue raised by this bill is whether the courts would deem its provisions an interference with their job to interpret constitutional provisions, i.e., s. 24, Art.I, Fla. Const., (separation of powers argument); or, whether, in spite of the Fifth District's opinion in *News-Journal Corp. v Memorial Hospital-West Volusia*, discussed above, the court would concur with the statutory clarification. It would seem that the court would welcome statutory clarification in light of the Florida Supreme Court's criticism in *Schwab* that the statutes did not provide "clear criteria for determining when a private entity is 'acting on behalf of' a public agency." *Schwab* at 1031. Thus, the issue may simply be whether the court agrees with the clarification in light of constitutional provisions.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No

¹ Exemptions for certain public hospital records and meetings are provided for in s. 395.3035, F.S. If a private entity is deemed to be "acting on behalf of" a public hospital, then such exemptions should apply to the private entity.

STORAGE NAME: h3585.go

DATE: March 6, 1998

PAGE 6

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No

(3) any entitlement to a government service or benefit?

No

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No

b. Does the bill require or authorize an increase in any fees?

No

c. Does the bill reduce total taxes, both rates and revenues?

No

d. Does the bill reduce total fees, both rates and revenues?

No

e. Does the bill authorize any fee or tax increase by any local government?

No

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

It would eliminate, in certain circumstances, the public's access to a private entities' records and meetings.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Certain private entity records and meetings would no longer be accessible to the public.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

creates s. 395.3036

E. SECTION-BY-SECTION RESEARCH:

See "Effect of Proposed Changes"

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

STORAGE NAME: h3585.go

DATE: March 6, 1998

PAGE 9

1. Non-recurring Effects:

None

2. Recurring Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

4. Total Revenues and Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None

2. Recurring Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None

2. Direct Private Sector Benefits:

None

3. Effects on Competition, Private Enterprise and Employment Markets:

None

D. FISCAL COMMENTS:

None

STORAGE NAME: h3585.go

DATE: March 6, 1998

PAGE 10

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

None

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Not applicable

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

Legislative Research Director:

J. Marleen Ahearn, Ph.D., J.D.

Jimmy O. Helms